PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ASSIGNMENT.

Advances to Assignee

A customer owed a firm of stockbrokers money on certain securities carried for him on a margin and the firm made a general assignment, whereupon the customer tendered payment of his debt to the assignee, and demanded the securities, which were refused because the firm had pledged the same as collateral. Thereafter the customer, in order to release his securities, advanced the market price on the day of redemption which enabled the assignee to redeem the securities primarily liable, such sum being largely in excess of the amount of his debt. Under these facts the Court of Appeals of New York holds *In re Price,* 63 N. E., 526, that the customer was entitled to payment in full, and in preference to general creditors, for the amount advanced beyond his debt, which increased the assets in the hands of the assignee. The judges dissent. No authorities are cited.

BAILMENT.

Warehouseman

A. took wheat to a public warehouse and elevator, and had it stored at the owner's risk of fire, and agreed to pay a certain price for storage. The custom of the warehouseman was in such cases to commingle grain so deposited for storage with like quality belonging to him, and from such mass to sell from time to time and replenish with such other grain as should be brought to him for storage or that he should buy. Of this custom A. was fully informed. The identical wheat so stored by A. was sold by the warehouseman. After this a fire consumed the warehouse with its contents, including enough wheat of the quality stored by A. to replace the same. Under these facts the Supreme Court of Kansas hold in *Moses* v. *Teetors,* 67 Pac. 526, that A. could not recover the value of his wheat from the warehouseman who had at all times kept on hand sufficient in quality and quantity to replace all wheat stored by A. Cf. *Chase* v. *Washburn,* 1 Ohio St. 244.

BANKRUPTCY.

In re Philadelphia & Lewes Transp. Co., 114 Fed., 403, the United States District Court (Eastern District Pennsylvania) holds that a carrier corporation is not engaged in trading or mercantile pursuits, so as to bring it within the Bankruptcy Law of 1898, subjecting thereto corporations "engaged principally in manufacturing, trading, printing, publishing or mercantile pursuits." "I feel sure," says the court, "that, if Congress had intended to subject such well-known and important classes of corporations as railroad, steamship, express, telegraph and other companies engaged in commerce, to the operation of the bankrupt act, they would have been named directly and specifically, or else the act would have contained such all-embracing terms as were used in the act of 1867,—"all moneyed, business, or commercial corporations and stock companies.'"

Corporations, Subject Thereto

In *McDonald* v. *Brown*, 51 Atl. 213, the Supreme Court of Rhode Island holds that under the Bankruptcy Act of 1898, c. 3, § 17, providing that a discharge in bankruptcy shall not release judgments in actions "for willful and malicious injuries to the person of another," a judgment for libel against a bankrupt recovered prior to the bankruptcy proceedings, is not cancelled by a discharge in bankruptcy, and the surety on the bankrupt's bond in the libel action cannot plead such discharge in defence to a suit on the bond. The court admits that the question is new, but cites as analogous and in support of this position the cases of *Disler* v. *McCauley*, 71 N. Y. Supp. 949 and *In re Freche*, 109 Fed. 620.

Effect of Discharge; Judgment for Libel

BANKS.

The Court of Appeals of New York, against the dissent of three judges holds, in *Cassidy* v. *Uhlmann*, 63 N. E. 554, that where a bank director has absolute knowledge that the bank is hopelessly insolvent, and fails to take such steps as lie in his power to close the bank for business, and takes part in any arrangement which permits the bank to be kept open and deposits to be received, he is personally liable for damages to a depositor who is ignorant of the insolvency, and whose

Liability of Directors

BANKS (Continued).

deposits were thereafter received, though the director has expressed an opinion that deposits should not be received, and an arrangement has been entered into for the receipt, under proper restrictions, where such arrangement was subsequently abandoned. The case presents an exhaustive discussion of the questions involved and an elaborate review of authorities.

Signature Cards

The use of signature cards as a part of modern banking methods is well known. In *Shoe Lasting Mach. Co. v. Western Nat. Bank of City of New York*, 75 N. Y. Supp. 627, the New York Supreme Court (Appellate Division, First Department), dealing with a question arising from their use, holds that where the treasurer of a foreign corporation opened a bank account with the defendant, and at the same time handed it authorized signature cards to guide it in the payment of checks drawn thereon, which cards contained the signatures of both the president and the treasurer, the defendant was not authorized to pay checks signed by the treasurer alone, and was liable to the corporation for the sums so paid.

BENEFIT SOCIETY.

Change of By-Law

In *Bottjer* v. *Supreme Council American Legion of Honor*, 75 N. Y. Supp. 805, it appeared that a benefit society, organized to relieve sick members, and to provide for the families of those who might die, issued a certificate to the wife of a member on his agreement to comply with all the laws of the order then in force, or which might thereafter be adopted. Later, under a power in the constitution, after the issue of the certificate, the Supreme Council enacted a by-law reducing the death benefit if a member died by suicide. The husband thereafter committed suicide, and it was held by the New York Supreme Court (Trial Term, Kings County) that the vested rights of the widow were not impaired by the by-law. The court regards the question as involved in serious difficulty, but holding that the right of the wife is vested, it decides that the by-law cannot have a retroactive effect so as to impair pre-existing obligations.

BILLS AND NOTES.

A firm of which A., who was insolvent, was a member, and which owed money to a firm composed of A. and B., at their instance to protect the interest of A. in such debt from his creditors, executed a note for the amount of the debt to B.'s wife, B. representing her in the matter. Under these facts the Supreme Court of Arkansas, the Chief Justice dissenting, holds that B.'s wife, having constructive notice of the facts, and the note being for an illegal purpose, so that half of the consideration was illegal, and the note being an entirety, it was void not merely as to creditors, but between the parties: *McTighe* v. *McKee,* 67 S. W. 754. Compare *Crawford* v. *Morrell,* 8 Johns. 253.

Fraud upon Creditors

Where a debtor executes a note and mortgage for a loan of money at a lawful rate of interest, and, at its maturity, enters into a new contract with the lender for a further extension of the loan, which is tainted with the vice of usury, and the lender, by agreement, retains the note and mortgage as collateral security to the usurious contract, in a suit to enforce the mortgage security the lender is restricted in his recovery to the amount due on the indebtedness at the time of making the usurious contract, after which all interest is forfeited (under statutory regulation): Supreme Court of Nebraska in *Chicago Lumber Co.* v. *Bancroft,* 89 N. W. 780. One judge dissents holding that the giving of the renewal note, by which it was agreed to pay an illegal rate of interest upon the loan did not operate to make the original note and mortgage usurious, and hence rights arising under it as to interest would be unaffected by this subsequent transaction.

Usurious Extension; Effect

In *Aniba* v. *Yeomans,* 39 Mich. 171, the Supreme Court of Michigan held that an indorsement, "I hereby transfer my right, title and interest of the within note to X.," destroys the negotiability of the instrument on the ground that it did not purport to transfer the entire interest. That case is distinguished in *Coddington Savings Bank* v. *Anderson,* 89 N. W. 787, where the indorsement read: "For value received, I hereby assign and transfer the within bond, together with all my interest in and rights under the mortgage securing the same to X. without recourse." This latter indorsement it is held does purport to transfer the entire instrument.

Negotiability

BUILDING AND LOAN ASSOCIATIONS.

What Law Governs?

A foreign building and loan association, having no office or general agent in Mississippi, but having special agents in various towns throughout the state, with authority to solicit subscriptions for stock, receive applications for loans, and receive payment of dues, interest and premiums, loaned money to a shareholder residing in Mississippi, on property located there, the contract providing that payments should be made at the association's office in the foreign state. Under these facts the Supreme Court of Mississippi holds, in *National Mutual Building and Loan Ass'n of New York* v. *Brahan*, 31 Southern, 840, that the contract, notwithstanding the recital as to the place of payment, was a Mississippi contract, and governed by the laws of Mississippi as to usury.

CARRIERS.

Limitation of Liability, Burden of Proof

While a common carrier may not by contract absolve itself from liability for its own negligence under the prevailing rule, the decision of the Court of Appeals of Kansas City in *Anderson* v. *Atchison, T. & S. F. Ry. Co.*, 67 S. W. 707, shows that a contract limiting liability may be of importance in its effect upon the burden of proof. It is there held that when a carrier not capable of contracting against liability for negligence contracts against liability for loss by delay in a shipment of freight, the shipper, in an action for damages resulting from delay, has the burden of showing that the delay was caused by the carrier's negligence.

Death of Animals

By a decision of three to two, the New York Supreme Court (Appellate Division, First Department) holds, in *Harrison* v. *Weir*, 75 N. Y. Supp. 909, that where a carrier receiving dogs for shipment by a certain train ships them by an earlier train, and, no one being present to receive them, returns them to the place of shipment, and the shipper, learning of their return, directs them to be reshipped on the next day, without in any way providing for them, he is not entitled to damages for the death of one of the dogs resulting from the long confinement, the proximate cause of the death being, in the view of the majority, the neglect of the shipper to have the dogs attended to before their reshipment.

CARRIERS (Continued).

Extra Fare

In *Monnier* v. *New York Cent. and H. R. R. Co.*, 75 N. Y. Supp. 521, it appeared that the plaintiff went to a railroad station eight or ten minutes before the arrival of a train, and applied for a ticket, but could not get it, because the agent was absent and did not return until the train left. The plaintiff boarded the train and explained his inability to get a ticket to the conductor, and tendered the fare to the point of destination. The conductor refused to take the fare unless five cents additional was paid, and on plaintiff's refusal to pay this additional sum, forcibly ejected him from the train. The New York statute authorized a railroad to demand from a passenger riding on one of its trains five cents in addition to the regular fare when a ticket office established by it is kept open for the sale of tickets at least one hour prior to the departure of each passenger train. Under these facts the New York Supreme Court (Apellate Division, Fourth Department) holds that the eviction of the plaintiff was wrongful, on the ground that such statute gave no authority to demand the extra sum when the ticket office was not open for the sale of tickets, and holds that a verdict of $500 is justified. One judge dissents, on the ground that the plaintiff practically invited the use of force, and was entitled to no substantial damages therefor: *Townsend* v. *Railroad Co.*, 56 N. Y. 295.

Waiting Rooms

The duty of a carrier to protect passengers from injury and insult is applied in *Houston & T. C. R. Co.* v. *Phillio*, 67 S. W. 915, where the plaintiff suffered the injury complained of while in the waiting-room of the carrier. The Court of Civil Appeals of Texas there holds that where a carrier permits a person in a drunken condition to enter its waiting-room, use indecent language, and, being armed with a knife, to make an assault on a female passenger, causing her to become nervous and sick from fright, the carrier is liable, and a verdict for $400 is not excessive.

Trespasser

The extent of the authority of a conductor in fixing the character of one who is carried upon the vehicles of the carrier presents some close points. This question was involved in *Purple* v. *Union Pac. R. Co.*, 114 Fed. 123, where the United States Circuit Court

CARRIERS (Continued).

of Appeals (Eighth Circuit) held that one who, knowing that a conductor has no authority to grant free transportation, enters and rides upon his train with the deliberate intention not to pay his fare, under an agreement or under a tacit understanding with the conductor that he shall ride free, commits a fraud upon the railroad company, and is not a passenger, but is a mere trespasser, to whom the only duty of the company is to abstain from willful or reckless injury. See and compare *Duff* v. *Alleghany Valley R. Co.*, 91 Pa. 458.

CONFLICT OF LAWS.

Negotiable interests continually present difficult questions as to what laws govern the decision of the various issues arising in reference to them. The Supreme Court of New Hampshire holds in *Limerick National Bank* v. *Howard*, 51 Atl. 64, that where an indorsee in blank sues on a note executed and payable in Vermont, and the evidence on the issue whether he is a bona fide holder tends to show he had knowledge of such facts as would lead a prudent person to suspect it was obtained by fraud, on admission that in such case the law of Vermont requires the issue to be submitted to the jury, the court cannot direct a verdict on the ground that the evidence does not show that the indorsee was not a bona fide holder. The reason given is that the indorsee intended to assume such contractual duties only as were involved in the construction of a blank indorsement by the law of Vermont, and the question affected the substantial rights of the parties which it was held should be determined by the law where the contract was performable and not by the law of the forum. Cf. *Downer* v. *Chesebrough*, 36 Conn. 39.

Notes; Bona Fide Holder

CONTRACTS.

The Supreme Court of Louisiana holds in *Perkins* v. *Frazer*, 31 Southern, 773, that a contractor who has unadvisedly refused to perform his contract may, while the situation of things is unchanged, retract the refusal, and go on with the contract, and is not cut off from so doing by the service upon him of a notice to the effect that the contractee will hold such refusal to be a default. Compare with this and with each other *Pratt* v. *Craft*, 20 La. Ann. 291, and *Turner* v. *Collins*, 2 Mart, (N. S.), 605.

Refusal to Perform; Retraction

CONVERSION.

In *Industrial & General Trust* v. *Tod,* 63 N. E. 285, it appeared that the bondholders of an insolvent railway company pending foreclosure, conferred on a reorganization committee title to the bonds for the purpose of reorganizing the affairs of the railroad, and gave them power for that purpose, and required the committee to adopt a plan of reorganization, and give notice thereof, so that any of the bondholders who were not satisfied with the plan might withdraw from the agreement and recover back bonds which he had deposited thereunder. The committee was authorized to form a new corporation and to purchase any of the assets and franchises of the old company for the new corporation. The agreement further provided that the committee might construe its provisions, and that their construction should be final, and the committee should not be liable for anything but willful misconduct. Under these facts the Court of Appeals of New York holds in a very elaborate opinion that an action for conversion will not lie against the members of the committee for using the bonds to pay the price of the railway company on a sale on foreclosure, without first making the plan of reorganization, and giving notice thereof, as such failure was a breach of contract and not a conversion of the bonds.

Reorganization of Railroad

CORPORATIONS.

It is held by the Supreme Court of Michigan in *Shadford* v. *Detroit, etc., Ry.,* 89 N. W. 960, that where a street railway company was composed of an actual consolidation of other companies and has received and retains all their properties, it cannot deny its liability on a debt due by one of such former companies, on the ground that such consolidation was illegal, nor can it contend that the original debtor was insolvent, and that therefore plaintiff was not injured by the consolidation.

Consolidation; Assumption of Debts

Where a president of a corporation, being a rival dominant, to certain unissued corporate stock, taking advantage of his position, but without authority, has the treasurer issue it to him; in a suit to compel a surrender of the certificate the Court of Chancery of New Jersey holds that he is not obliged to surrender it because of its unauthorized issuance, without regard to whether or not he is entitled to the stock: *Lakewood Gas Co.* v. *Smith,* 51 Atl. 152.

Unauthorized Issuance of Stock

DAMAGES.

Difficulty in Estimating

It is held by the Court of Errors and Appeals of New Jersey in *Jenkins* v. *Pennsylvania R. R. Co.,* 51 Atl. 704, that in an action of tort against a railroad company for negligently operating its locomotives in such manner as to cause them to emit smoke denser and more offensive in quality and greater in volume, than reasonably required for the proper operation of the railroad, to the injury of the plaintiff's property, situated near to the railroad, where the evidence shows such negligent operation, and substantial damage to the plaintiff's property, directly attributable thereto, it is erroneous for the trial court to limit the plaintiff's recovery to nominal damages, on the ground of the inherent impossibility of determining how much of the damage was caused by smoke necessarily emitted in the careful operation of the railroad, and how much was caused by the smoke that was due to negligent operation. In such case, it is said, the jury should be left to make from the evidence the best evidence in their power, as reasonable men, and award to the plaintiff compensatory damages for the actionable injury. Compare *Ogden* v. *Lucas,* 48 Ills. 492.

DANGEROUS PREMISES.

Invitation to Enter

Where the owner or occupier of lands by express invitation induces a person to make use of a portion of the premises for an expressed purpose his liability is confined within the limits of the invitation and does not extend to injuries received by the person invited while using the premises for a purpose not expressed, and not authorized by the invitation. Court of Errors and Appeals of New Jersey in *Ryerson* v. *Bathgate,* 51 Atl. 708. It is on this principle that the case is distinguished by the court from the recent case of *Furey* v. *Railroad,* 51 Atl. 505, which followed the older case of *Phillips* v. *Library Co.,* 55 N. J. Law, 307.

ELECTRIC RAILROADS.

Travelers Along Tracks

Though a traveler driving upon or in close proximity to the tracks of a street railway is bound to look ahead to see whether a car is liable to come in collision with him, it cannot be said as a matter of law, the Supreme Court of Michigan holds in *Tunison* v. *Wea-*

ELECTRIC RAILROADS (Continued).

dock, 89 N. W. 703, that he is bound to be constantly looking backward for that purpose, so as to be free from negligence.

ESTOPPEL.

The Supreme Court of Delaware holds in *Baird* v. *Harper,* 51 Atl. 141, that estoppel acting only against the person who did the act or those claiming under him, if he did the act individually or in some capacity other than as administrator, he will not be estopped thereby when acting as administrator. In order to successfully invoke this doctrine against an administrator, it must be shown that the act was done, or the admission made by him in such character and not individually. Cf. *Kellerman* v. *Miller,* 5 Pa. Super. Ct. 443, *Wright* v. *De Groff,* 14 Mich. 164.

Administrator

EVIDENCE.

It is generally considered the province of the court to pass on the preliminary questions which determine whether a dying declaration as to the cause of death is admissible, but in *Young* v. *State,* 40 S. E. 1000, the Supreme Court of Georgia holds that if the injured person was in fact *in articulo mortis,* and the circumstances were such as to indicate that he must have known that this was so, it is proper to allow the declarations to be proved, and instruct the *jury* to determine for themselves whether or not the statements made by the deceased were "conscious utterances in the apprehension and immediate prospect of death." See Stephen on Evidence, Article 26.

Dying Declarations

HUSBAND AND WIFE.

A contract of separation between husband and wife provided that, in consideration of certain money and other property paid by the husband, the wife forever discharged her husband, his heirs and executors, from any claims and demands in law and equity. The question subsequently arose whether this included a release of dower and the Supreme Court of South Carolina holds in *Moon* v. *Bruce,* 40 S. E. 1030, that as a claim for dower never could exist against her husband since it could not arise until his death, the instrument was insufficient as a release of dower.

Separation Agreement, Dower

JUDGMENTS.

Conclusiveness Against Stockholders

The Supreme Court of Michigan holds in *McBryan* v. *Universal Elevator Co.*, 89 N. W. 683, that a judgment against a corporation on a note is not conclusive against the stockholders, but in a suit to enforce the stockholders' liability for payment of it, they may show that the consideration failed because the payee took back the property for which it was given. Cf. *Bohn* v. *Brown*, 33 Mich. 258, where the court said: "If the proceedings against the corporation should appear to be tainted with fraud or collusion between the claimant and the corporation, the judgment would not be good as inducement, or as an adjudication to fix the liability of the stockholder through it, or to fix the amount, and the suit against the stockholder would fail inevitably."

LIBEL.

Justification; Damages

In *Stuart* v. *News Pub. Co.*, 51 Atl. 709, the Court of Errors and Appeals of New Jersey holds that though the fact that the matter alleged to be libellous had been, previous to its publication in a newspaper (1) a matter of common rumor; or (2) found in affidavits charging the plaintiff with the offence, which had been filed with a justice of the peace; or (3) found in a petition for divorce which had been filed in chancery by a complainant, charging that the plaintiff had committed the offence published, is not legal ground for a justification of the publication of the libel, nevertheless such facts are proper to be taken into consideration by the jury in determining what damage the publication has done the plaintiff.

MUNICIPAL CORPORATIONS.

Drains; Recovery

In *Williams* v. *Greenville*, 40 S. E. 977, the Supreme Court of North Carolina holds that where a drainage ditch constructed by a municipal corporation becomes, through its negligence, the depository of dead animals, and so choked that water overflows the premises of one residing near by, and the condition of the drain causes illness in his family, he cannot recover from the corporation for physician's bills, medicines, increase in expenses of his family or for his loss of time, but that he might recover for any damage done to his land by the overflowing of the drain. One judge dissents regarding the distinction as one without substance.

NEGLIGENCE.

Contributory Negligence; Identification

The doctrine of identification by which in certain cases a child is barred from recovery by the negligence of a parent is applied by the Court of Appeals of Maryland in *Mayor, etc., of City of Cumberland* v. *Lottig,* in a case where a mother, with her young child and others, went on the roof of a building in which she lived, in the night time, to watch a play in a theatre across the street, and placed the child so that he could get hold of an electric light wire, though she knew of its presence and warned others against it. The child having been injured was refused recovery on account of such negligence on her part.

Alighting from Moving Train

The general rule that the voluntary alighting from a moving train, where one is not urged to do so by any employe of the railroad company, constitutes negligence, is well known; but how difficult it is to arrive at any satisfactory legal rule as to negligence in particular cases appears from *Toler* v. *Yazoo, etc., R. Co.,* 31 Southern, 788, where the plaintiff's testimony was that she went immediately to the steps of the car when the station was called, and it being dark and she, thinking the train had stopped, got off, and was injured, the train being in motion, and it further appeared that thereafter the train was again stopped, by the ringing of the bell, to let off other passengers. These facts the Supreme Court of Mississippi holds are sufficient to be submitted to the jury upon the question of the plaintiff's negligence.

PARTIES.

Real Party in Interest

With three judges dissenting the Supreme Court of Kansas holds in *Stewart* v. *Price,* 67 Pac. 553, that one holding by written assignment an itemized, verified account, is not the real party in interest, and cannot maintain an action in his own name, where it is shown that by a contemporaneous oral agreement he had agreed to pay the full amount thereof when collected, to his assignor; and this it is held, is true notwithstanding the assignor testifies that the defendant in the action does not owe her anything, and that the whole amount is due her from the plaintiff, and that he is to pay her provided he recovers in the action. This holding is supported by the

PARTIES (Continued).

decisions in Indiana, *Swift* v. *Ellsworth,* 10 Ind. 205, but is contrary to the general interpretation of the Code. In general the result of the interpretation of the "real party in interest" section of the Code is that the rights of an assignee to sue have in some cases been broadened, but in none narrowed.

PHYSICIANS.

Specialists

A physician holding himself out as having special knowledge and skill in the treatment of particular diseases is bound to bring to the discharge of his duty to a patient employing him as such specialist, not merely the average degree of skill and knowledge possessed by general practitioners, but that special degree of skill and knowledge possessed by physicians who are specialists in the treatment of such disease, in the light of the present state of scientific knowledge: Appellate Court of Indiana in *Baker* v. *Hancock,* 63 N. E. 323.

RAILROADS.

Limitation of Liability

The principle which prevails in most jurisdictions that a common carrier cannot limit its liability for negligence is extended by the Supreme Court of Vermont in *Tarbell* v. *Rutland R. Co.,* 51 Atl. 6, to the case where the contract is not between the company and the person subsequently injured but between the company and the next of kin of such person, the court holding that a contract between a railroad company and the next of kin of an employe, whereby the next of kin released the railroad from all damages that might accrue to him by reason of the railroad's negligence, is void as against public policy.

ROBBERY.

What Constitutes

The Supreme Court of Georgia holds in *Jackson* v. *State,* 40 S. E. 1001, that though a valuable article in proximity to and under the protection of its owner is constructively upon his person, suddenly snatching it up and carrying it away with intent to steal it, is not robbery, when there is no intimidation of the owner for the purpose of getting possession, and no resistance by him to the act of taking. This, it is said, is none the less true when

ROBBERY (Continued).

the article thus taken is a weapon, or capable of being used as such, and the wrongdoer, after taking it, therewith intimidates the owner in order to effect an escape. See *Clements* v. *State,* 84 Ga. 660.

SPECIFIC PERFORMANCE.

It is held by the Supreme Court of Wisconsin in *Park* v. *Minneapolis, etc., Ry. Co.,* 89 N. W. 532, that where a contract is so indefinite in its terms that a court of equity cannot decree specific performance, the court will not retain jurisdiction to award damages for a breach in the absence of any reason being shown why such damages should not be recovered at law. "Only in exceptional cases," says the court, "where unnecessary hardship clearly demands, should courts of equity assume that province." See *Combs* v. *Scott,* 76 Wis. 662, 671; *Cole* v. *Getzinger,* 96 Wis. 559.

Indefinite Terms

STREET RAILWAYS.

The Court of Appeals of New York holds in *Peck* v. *Schenectady Ry. Co.,* 63 N. E. 357, that the use of a city street for a surface railroad operated by electricity is an additional burden on the property rights of the owners of the fee, subject to the easement of the highway. And further that the question whether an injunction restraining the construction of an electric street railway on a street, the fee of which is in abutting owners, shall restrict the construction of the railway until the payment of compensation and denying a perpetual injunction if such damages are paid, or whether the injunction shall be made perpetual, leaving the railway company to its proceedings to condemn, is in the discretion of the court.

Abutting Owners; Injunction

In *Mayor, etc., of Newark* v. *State Board of Taxation,* 51 Atl. 67, it is held by the Court of Errors and Appeals of New Jersey that a street railway company owns no interest in the soil of the highways over which its road passes which may be taxed as real estate. But the inherent

Taxation

STREET RAILWAYS (Continued).

value of its property above the cost of reproducing the material constituents of its line arises from its franchise, which is subject only to state and not municipal taxation. See *State Board of Assessors* v. *Central R. Co.*, 48 N. J. Law, 146.

STREETS.

Discontinuance; Special Damage

A statute of New Hampshire (Pub. St. c. 72, § 4), contains a provision analogous to the statutes of other states, providing for the assessment of damages for the discontinuance of a highway. The Supreme Court of that state holds in *Cram* v. *City of Laconia,* that under this law only such damages as are not common to the public, but are peculiar and special, and the direct result of the discontinuance may be assessed, and further, that a discontinuance leaving undisturbed the highway in front of an abutter's premises, connecting with the general system of streets, though resulting in a diversion of travel, and a consequential depredation of such owner's property, impairs no vested right, and furnishes no cause of action for damages. The court cites with particular approval the case of *Smith* v. *Boston,* 7 Cush. 254, where the opinion of the court is delivered by Chief Justice Shaw. The opinion in the case in hand is a particularly able review of the law upon the subject.

SURFACE WATER.

Obstruction; Overflowing Land

Where the overflow of a swamp on adjacent lands cannot reasonably be foreseen, by the construction of a side track by a railroad company without a ditch in connection therewith, the company, if the side track is a reasonable use of the land, is not liable for the injuries resulting from the original failure to construct the ditch: Supreme Court of New Hampshire in *Priest* v. *Boston, etc., R. R.,* 51 Atl. 667. The question whether the railroad company should have foreseen the injury which resulted from the construction of the side track without the ditch, and the question of the reasonableness of the use of the property, it is held, is for the jury. See and compare *Ladd* v. *Brick Co.,* 68 N. H. 185.

SURFACE WATER (Continued).

Diversion; Artificial Erection

Against the dissent of five members of the court, the Court of Errors and Appeals of New Jersey lays down the principle that the diversion or altered transmission of surface water, caused by the erection of a building upon and over which it is accustomed to flow, affords no ground of action to a person who suffers injury by reason thereof: *Jessup* v. *Bamford Bros. Silk Mfg. Co.,* 51 Atl. 147. The court relies principally upon *Bowlsby* v. *Speer,* 31 N. J. Law, 351, in which it was said: "Neither the retention, diversion, repulsion, nor altered transmission of surface water is an actionable injury, even though damage ensues." Unless the land be left idle, it is said, it would be impossible to enforce rigorously any other rule. On the other hand, the dissenting judges contend that the correct rule is that an owner of land may repel or divert the surface water which would otherwise come upon his land from the land of an adjoining owner, or he may alter the course of transmission of such surface water without liability to the owner of the adjoining land, provided that in so doing he does not collect such surface water, and discharge it in a collected flow, in unusual quantities or upon an unusual place on the adjoining land. If he does so, and the collected discharge produces injury he is liable to the adjoining owner for such injury.

WATER COURSES.

Municipality

Discussing the extent of the riparian rights of a municipality, the Supreme Court of Ohio holds, in *City of Canton* v. *Shock,* 63 N. E. 600, that an incorporated municipality situated on a natural flowing stream is, in its corporate capacity, a riparian proprietor, having the rights and subject to the liabilities of such proprietor; and, further, that such municipality so situated has the right to use out of such stream all the water it needs for its own proper purposes, returning to the stream the water not consumed in such use, but it may not materially diminish the flow of water in such stream to the injury of a lower proprietor, by supplying water from the stream to persons outside of such municipality or to be transported away from such city or by supplying to manufactories for power purposes more than a reasonable share of the water considering all the circumstances. See *Railroad Co.* v. *Miller,* 112 Pa. 34.